IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 37

JAMES V. GILES AND JOHN G. GILES,
Petitioners,

v.

STATE OF MARYLAND,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals of Maryland (App. B of Petition) is reported at 239 Md. 458, 212 A. 2d 101.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether petitioners were convicted in violation of the Fourteenth Amendment to the United States Constitution by reason of any suppression by the State of material exculpatory evidence?

2. Whether petitioners were denied due process of law in violation of the Fourteenth Amendment to the United States Constitution by reason of the fact that the Maryland courts have retained the power to determine the admissibility of evidence despite the Maryland doctrine that the jury is the judge of the law?

3. Whether petitioners were denied the right to assistance of counsel in violation of the Sixth and Fourteenth Amendments by introduction at their criminal trial, without objection, of admissions made by them which were voluntary in fact but made during police interrogation when petitioners did not request an opportunity to consult counsel?

4. Whether the due process clause of the Fourteenth Amendment guarantees one the right to file a motion for new trial after conviction for a criminal offense; and whether petitioners were denied due process under the then applicable, but subsequently amended, procedural rule which provided that new trial motions based on newly discovered evidence must be filed within three days after verdict?

STATUTES AND RULES INVOLVED

The pertinent provisions appear in the Petition at pp. 37-39 (App. A of Petition) with the exception of Rule 764 of the Maryland Rules of Procedure (1965 Cum. Supp.) which is set forth in Respondent's Appendix A, infra.

STATEMENT

The case sought to be reviewed was brought under Maryland's Post Conviction Procedure Act, Maryland Code (1957), Cum. Supp. (1964), Article 27, Section 645A set forth in Appendix A of the Petition. Petitioners originally were convicted of rape in the Circuit Court for Montgomery County, Maryland, by a jury, on December 5, 1961. On December 11, 1961, the trial court (Judge James H. Pugh) sentenced Petitioners to death. The convictions were affirmed by the Maryland Court of Appeals, *Giles v. State*, 229 Md. 370, 183 A. 2d 359, and an appeal to this Court was dismissed for want of a substantial federal question. *Giles v. Maryland*, 372 U.S. 767.

Subsequently, Petitioners moved in the trial court for a new trial on grounds of newly discovered evidence. The Motion was denied by the trial court, and the denial was affirmed in the Court of Appeals on May 6, 1963. *Giles v. State*, 231 Md. 387, 190 A. 2d 627.

On October 24, 1963, the Governor of Maryland, Honorable J. Millard Tawes, commuted Petitioners' sentences to life imprisonment. Then, on May 11, 1964, Petitioners filed in the trial court a Petition under the Post Conviction Procedure Act (R. 8-33), seeking to collaterally attack their convictions as having been procured in violation of the United States Constitution in several respects, of which the following claims survive: (a) that the State suppressed evidence in violation of the due process clause of the Fourteenth Amendment; (b) that Petitioners were denied due process because of the Maryland procedural rule requiring that new trial motions based on newly-discovered evidence be filed within three days after verdict prevented Petitioners from proving newly discovered evidence (R. 8); and (c) that Petitioners had been denied their right to the

assistance of counsel guaranteed by the Sixth and Fourteenth Amendments because of the introduction at the criminal trial of evidence of admissions made by them to police while under arrest and without counsel (R. 89-90). The trial court (Judge Walter H. Moorman) hearing the post conviction petition found that Petitioners had been denied due process under the Fourteenth Amendment by reason of the State's alleged suppression of evidence and ordered that Petitioners be accorded a new trial (R. 164). The Petitioners' other claims were rejected (R. 159-60). On appeal by the State, the Court of Appeals of Maryland reversed, holding that there had not been an unconstitutional suppression of evidence and agreeing with the rulings of the trial court that were adverse to Petitioners (R. 231-62, *State v. Giles*, 239 Md. 458, 212 A. 2d 101).

A. *The Criminal Proceedings*

On July 20, 1961, Joyce Roberts (age 16), her boy-friend, Stewart Foster (age 21), and two other young men, George Trent and William Fellows, drove in Trent's car to a secluded spot in Montgomery County near a dam on the Patuxent River to go swimming, arriving between 11:00 P.M. and 11:30 P.M. By previous arrangement they were to meet several friends there, including one of Joyce Roberts' girl friends who was to bring Joyce's bathing suit with her (T. 71).* Their friends failing to appear, the group started to leave and went a short distance when Trent's car ran out of gas. Joyce Roberts and Stewart Foster remained in the car while the other two young men set out to get gas. The area was thickly wooded, very dark, and desolate, the nearest residence being approximately one block away (T. 92).

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* References in this form are to pages of the transcript of testimony taken at the original trial of the case.

Shortly after the others departed, the stranded couple saw three young colored men (the Gileses and Joseph Johnson) approaching the car. Foster became frightened, rolled up the car windows, and locked the doors. The trio demanded money and cigarettes, but Foster told them he had neither. The colored men then went to the rear of the car where one stated: "Let's drag his fucking ass out of there and get some of that pussy" (T. 109). Other threats were made to drag Foster from the car and carnally know the girl. One or more of the intruders then threw rocks at the automobile, shattering the windows, and allowing them to reach in and unlock the doors. As this happened, Foster testified:

> "I was so scared and I said, 'Joyce, make a run for it and I will hold them back as long as I can'" (T. 34).

Foster then jumped from the automobile to hold off the attack and was struck in the face with a rock and rendered unconscious. Joyce, at the same time, got out of the other side of the vehicle and fled into the woods. She had gone a short distance when she tripped and fell. Out of breath and unable to run further, she lay quiet in the thick underbrush trying to hide (T. 60).

Petitioners and Johnson then separated and sought Joyce in the woods. John Giles was the first to find her. According to the girl, he laid on top of her until the other two arrived (T. 61-62). She meanwhile pleaded with John Giles to let her go farther back into the woods so the other two couldn't find her, telling him that he could follow her later. As to this Joyce testified:

> "I thought if I could get away from him, I could get get away from all of them" (T. 62).

Upon discovery by the other two, the men all leaned over her, began kissing her, and one reached for the zipper on

her shorts (T. 63). Joyce, according to her version, protested but was told "either you do it or we will do it" (T. 63). Completely dazed (T. 63), alone in the woods with three demonstrably violent young men, and afraid for her life (T. 87), she complied with their demand and removed her shorts. She was then subjected to successive rapings, first by John Giles, then by Joseph Johnson, finally by James Giles (T. 64). During the final attack, Joyce heard Foster, who had regained consciousness, cry out that he was going to get the police, but before she could call to him for help, she heard him running off (T. 65).

Joyce related that the acts of intercourse were forcibly had against her will and without her consent. John Giles, on the other hand, denied having intercourse with the girl; and James Giles claimed he had intercourse with her consent.

According to John Giles, he followed the girl into the woods, although he claimed he did not at the time know that she was a female. He related that she "insisted" (T. 140) that they have intercourse, but he refused. He remained with her five or ten minutes in the woods before the others came.

According to James Giles, he went into the woods only to look for his brother, and not for the girl. Upon finding them, he claimed that the girl insisted upon intercourse. He did not know whether John had intercourse with the girl, after being found by the group, although admitting John spent about ten minutes with the girl while he stood about fifteen feet away (T. 195-196).

After regaining consciousness, Foster heard Joyce "whimpering" in the woods (T. 44). He made his way to the nearest home where the police were called. Within minutes, at approximately 12:55 A.M., Sergeant Duvall

of the Montgomery County Police Department arrived on the scene. Petitioners and Johnson fled through the woods after seeing the headlights of the police car (T. 65). Joyce was found lying on the ground, naked for the most part, without shoes, sobbing, and in a semi-conscious state (T. 65, 93, 94). She was taken by ambulance to a hospital where examination revealed that she had abrasions of the skin over her shoulders, and on her knees and legs; and that secretions containing numerous spermatozoa cells were found in the vagina (T. 47-48), showing recent intercourse.

James Giles was arrested at his home the next morning having spent the night hiding in the woods (T. 113, 174). John Giles was arrested at a gas station on July 23rd, having spent most of the two intervening days hiding in the woods (T. 158). Joyce identified James Giles at a police line-up on July 21st, and John Giles at a line-up held on July 23rd, as two of the men who had assaulted her (T. 66).

In statements to the police following their arrest, James admitted that he had thrown rocks at the automobile; that he had chased Joyce into the woods; that he had argued with his brother as to who would be first to have intercourse with her; that he had intercourse last and was engaging in the act when the police car arrived. He further admitted that it might have been he who made the statement, "Let's drag his fucking ass out of there and get some of that pussy" (T. 108-113). John Giles, in his statement, admitted his presence at the crime scene; that he had chased the girl into the woods; but denied that he had intercourse with her (T. 118-119).

At the trial Petitioners related that the reason for breaking into the car was to prevent Foster, who they said had

a gun in the car, from shooting them. It was further related (T. 139, 151) that Joyce Roberts told the Petitioner that she was on probation and didn't want to get into trouble; but this was denied by the girl (T. 84-85). She also denied making any statement to the effect that she had had intercourse with numerous other boys that week and that a few more would not make any difference (T. 84), as had been urged by Petitioners.

The jury returned a verdict of guilty against each Petitioner without qualification as to sentence.

B. *The Post-Conviction Proceedings*

At the hearing in the post conviction proceeding held on July 20, 21, and 22, 1964, it was shown that after the Petitioners' arrest, an experienced member of the Montgomery County Bar, Stedman Prescott, Jr., was appointed by the court to represent them. He made an investigation of the case which included a discussion of the matter with the State's Attorney for Montgomery County and an examination of the entire file of the prosecution, including the police report. No other request for information or further assistance of the State's Attorney was made. The trial did not take place until December, 1961, several months after the attorney's appointment, and ample time for preparation was allowed.

From his clients, the defense attorney learned of the facts surrounding the alleged consent of the prosecutrix and knew this would play a role in the defense. He was, however, unable to discuss the case personally with Joyce Roberts because of her mother's denial of such permission. Also, the attorney sought to examine records of the juvenile courts in Montgomery and Prince George's Counties, but was not allowed to see those records by juvenile

authorities. Under Rule 922 of the Maryland Rules of Procedure, records may only be examined upon written permission of the court. Such permission was apparently not sought by defense counsel prior to trial.

The most important evidence presented at the post conviction hearing involved an alleged suicide attempt by the prosecutrix and an alleged false rape claim. About five weeks after the rapes by the Petitioners and Johnson, Joyce Roberts went to a party in Prince George's County, and upon entering a bathroom a boy followed her and had intercourse with her. Another boy had intercourse with her in the yard shortly thereafter (R. 30-32, 65-68, 238). Her physical resistance to these acts, if any, was slight, her main concern appearing to be that all of the boys at the party would find out and desire to have intercourse with her.

The following morning Joyce was admitted to Prince George's General Hospital having taken an overdose of Bufferin tablets and sleeping pills. These facts were brought out at the hearing by Sergeant Wheeler of the Prince George's County Police. The Sergeant had interviewed the prosecutrix in the hospital after he had received a complaint from Joyce's father that she had been raped at the party on August 26, 1961.

The father had gleaned his information from hearsay. Joyce had been visited in the hospital by a friend, Robert Bostic, who asked why she had taken the pills. Her answer was that she had been raped and that this was the reason for her actions. Bostic informed Joyce's mother of this without Joyce's knowledge. The prosecutrix's father then made a complaint of the alleged rape to Lieutenant Lloyd Whalen of the Montgomery County Police Department, who told Joyce's father to contact the Prince George's

County police, since the alleged rape had occurred in the latter county (R. 31-32, 60, 65-73, 237). Lieutenant Whalen made no investigation of the complaint nor of the facts concerning the overdose of pills taken by Joyce, of which he was also informed (R. 61, 237). Lieutenant Whalen was not informed that Joyce had attempted suicide and he did not have any information that she was mentally disturbed or ill, although he was aware that at one time Joyce's mother had taken her to see a psychiatrist (R. 236, 237, 82). Also, the Lieutenant made no investigation into the character of the prosecutrix (R. 79, 81, 84, 130, 133-134).

When the girl's father called the Prince George's County Police, Sergeant Wheeler visited the hospital. He did not then know that Joyce was the complainant in a rape case in Montgomery County. At the hospital, after relating the incident at the party of August 26th, Joyce stated to the Sergeant that she did not wish to make any complaint of rape and that she had not authorized anyone to make such a complaint for her. She further related that she would refuse to testify against the two boys if the matter was pressed. Wheeler marked the Prince George's County police file "Closed and unfounded," with the consent of Joyce's father (R. 31-33, 60-72, 236-238). As to the reason for the girl being in the hospital, the Sergeant said that he may have been told that it was as a result of taking some kind of tablets, but he was not sure that he had been told this. Joyce also related to Sergeant Wheeler that during the preceding two years she had engaged in numerous acts of intercourse with different persons, including one of the two boys with whom she engaged in intercourse at the party. Sergeant Wheeler was not interviewed by the State's Attorney or police of Montgomery County.

The State's Attorney testified that although he knew prior to the trial that Joyce was hospitalized because of

taking excessive drugs, he had no knowledge that the taking of drugs was a suicide attempt. He suspected that the drug incident might have been connected with the rapes on July 20, 1961 concerning the Petitioners. He had been informed of a rape charge in the other county involving Joyce Roberts, in which the charge was made by one other than Joyce, and he was aware that after investigation the charge was dropped as being without merit (R. 246, 238, 157, 81, 133-134).

The State's Attorney was never given any information that Joyce Roberts was mentally or emotionally disturbed or anything that reflected upon her credibility. He also stated that at no time did he conceal any information from the court or jury which he thought was admissible, exculpatory evidence.

The records of the Prince George's General Hospital which were introduced at the post conviction hearing showed that Joyce had been admitted on August 27, 1961, following an overdose of pills in a suicide attempt, secondary to "adjustment reaction of adolescence." She was given an admitting diagnosis of psychopathic personality and placed in a psychiatric ward before discharge nine days later. The attending physician diagnosed the condition as an adolescent reaction.

A psychiatrist related that the girl was mentally ill at the time of the attempted suicide, since he considered a teen-ager's attempted suicide as evidence of a mental disorder. He did state, however, that many conditions not derived from mental illness could cause an attempted suicide. He further related that he could not state an opinion as to the girl's mental condition at the date of the trial (R. 122-123).

Petitioners did not call the prosecutrix to testify at the post conviction hearing, although apparently she was available for such purpose. Other evidence, consisting of affidavits by acquaintances of the prosecutrix, was entered in the record indicating that she was a sexually promiscuous girl.

ARGUMENT

I.

The Information Known by the Prosecution Concerning Events Subsequent to the Date of the Crime and Relating to the Prosecutrix Was Not Material, Nor Was Any Failure to Disclose Such Information Prejudicial to the Petitioners.

The Maryland Court of Appeals found that the Petitioners were not denied due process of law holding that the evidence claimed to have been suppressed (a) was neither material to the guilt of the Petitioners or to the punishment to be imposed, nor (b) was any failure to disclose information prejudicial to the accused (App. B. of Petition, at pp. 57-58).

There is no question but that if the State knowingly withholds material evidence exculpatory to an accused, it is a violation of due process, and such would be grounds for relief under Maryland's Post Conviction Procedure Act. *Brady v. State*, 226 Md. 422, 174 A. 2d 167 (1961), aff'd 373 U.S. 83 (1963). Yet it must be recognized that in finding a violation of due process the State action must go "beyond the line of tolerable imperfection" and fall into the field of fundamental unfairness. *Curran v. Delaware*, 259 F. 2d 707, 711, and *Barbee v. Warden*, 331 F. 2d 842 (4th Cir. 1964). No amount of eloquence or strained semantics, however, can convert the action of the State of Maryland in the case at bar, into action fundamentally unfair

or violative of due process of law, warranting review by this Court on certiorari.

Petitioners desire this Court to set forth a rule of law requiring the State prosecuting authorities to become co-counsel for the defense. They contend that any admissible and useful evidence withheld by the State amounts to a denial of due process if the State had knowledge and the defense did not. They seek a rule without limitation, one in which any evidence that may have an effect on the outcome of the trial shall be considered material, regardless of whether the evidence is technically admissible and useful in the sense that it contradicts trial evidence; regardless of whether the evidence would be capable of clearing or tending to clear the accused of guilt; regardless of whether it would be exculpatory; and regardless of whether an accused may be prejudiced in fact by the suppression. Such is not the intent of the suppression rule, and the cases make this clear. The rule set forth by the Maryland Court of Appeals is eminently correct.

First it must be obvious that in any criminal investigation, numerous bits of evidence are accumulated. Many of these are so innocuous that they are never used, others are clearly immaterial. Much evidence is ferreted out by the police before the matter is turned over to the State's Attorney for prosecution. Every scintilla of proof need not be given in the process. If the evidence is of such a nature that it does not reasonably tend to either inculpate or exculpate, then failure of the police to relay such information cannot mount up to a denial of due process. The prosecution, by the same token, therefore, can not be legitimately charged with *all* of the knowledge possessed by any State official wherever located, or contained in any remote documents, having information relating to a State witness in a criminal case without regard to the connection of such

official or document to the actual prosecution of the case. The cases hold, as did the decision below, that for the purposes of the suppression doctrine the prosecution is charged with the material knowledge of the police officers and authorities investigating the particular crime. *Barbee v. Warden*, *supra*; *Hall v. Warden*, 222 Md. 590, 158 A. 2d 316. To make the prosecution chargeable with knowledge of the police of another county, as urged by Petitioners, would impose, as the Maryland Court of Appeals stated: "a practically impossible and unworkable burden on local authorities" (App. B of Petition, p. 53).

The Petitioners rely heavily on *Griffin v. United States*, 183 F. 2d 990 (D.C. Cir. 1950) and *Barbee v. Warden*, *supra*, in urging an expanded applicability of the suppression rule. The Circuit Court of Appeals in *Griffin* did state that the prosecution must disclose evidence that "may reasonably be considered admissible or useful to the defense," but under the facts of the case it was clear that the undisclosed evidence, concerning threats of the victim toward the accused, was obviously material and exculpatory evidence. Also, the court was speaking in its supervisory role over the conduct of criminal trials in the federal courts, and its statement was not necessarily made so as to state a requirement of due process. Similarly, in *Barbee v. Warden*, *supra*, which followed the "reasonably admissible and useful" language of *Griffin*, the suppressed evidence was obviously material and exculpatory. The undisclosed evidence there was a ballistics report to the effect that the gun found in the accused's car, and described in the trial as similar to the one carried by him, was not in fact the gun used in the shooting.

In *Brady v. Maryland*, *supra*, also relied on by Petitioners, the police purposely withheld a statement by one Boblit, co-defendant with Brady, in which he admitted that

he had in fact killed the victim. Without this statement to consider the jury returned an unqualified verdict of first degree murder. There is little doubt that the statement would have entered into the jury's decision and of course the failure to produce it was found to amount to a denial of due process.

The situation here presented does not even remotely approach the unfair conduct in *Brady*, *Barbee*, or *Griffin*. In the three cited cases the acts complained of were highly reprehensible. In *Barbee*, the suppressed evidence was exculpatory and there was more than a small possibility that it may have been enough to acquit the defendant. Likewise in *Brady*, the statement of the co-defendant was highly material, if not to guilt or innocence, at least to the question of sentencing. In this case we have nothing but the highest degree of speculation that the evidence, if admissible, would have had any beneficial effect.

Before deciding what evidence can be said to have been suppressed, it must first be determined what the prosecution was chargeable with knowing. The Maryland Court of Appeals held the prosecution charged with knowledge of all "pertinent facts related to the charge known to the police department who represent the local subdivision that has jurisdiction to try the case" (App. B of Petition, at p. 53). This meant that the State's Attorney for Montgomery County was chargeable with knowledge of those facts known to the police department of that county. See *United States v. Lawrenson*, 298 F. 2d 880 (4th Cir. 1962), where knowledge of the Washington office of the FBI was held not imputable to the members of the Baltimore office of the FBI.

What the prosecution in this case knew was that rape charges had been preferred by the father of Joyce Roberts,

which the prosecutrix denied making, and which investigation showed were groundless; that Joyce Roberts had engaged in sexual activities with boys on August 26th, 1961, under circumstances not amounting to criminal rape; that she had taken an overdose of pills and was admitted to a hospital; and that her mother, in the past, had taken her daughter to a psychiatrist. There was doubt in the record as to whether the prosecution knew the overdose was intentionally taken and was a suicide attempt, but the Maryland Court of Appeals drew the "strongest reasonable inference which the prosecution could conclude from the information known to it" (App. B of Petition, at p. 53) and found the prosecution also chargeable with this knowledge. To hold that the prosecution went beyond the line of tolerable imperfection and was fundamentally unfair in this case, as claimed by Petitioners, would be to write into the Fourteenth Amendment of the Constitution an entirely new and unrestricted suppression rule. That such a requirement should spring from the facts of this case because of the alleged suppression of an alleged rape claim where the prosecutrix in fact never made such a claim is unworthy. Even in those States where a false rape claim has been held admissible in evidence, the claim must in fact be made, and by the prosecutrix. 58 *Am. Jur., Witnesses*, §682; Annotation, 75 A.L.R. 2d 508, *Impeachment or Cross-Examination of Prosecuting Witness in Sexual Offense Trial by Showing that Similar Charges Were Made Against Other Persons.* The alleged suicide attempt was never in fact proven to be such. Not a single witness testified that the overdose of pills taken by the prosecutrix was in fact an attempted suicide or was so told by the prosecutrix. The hospital records are inconclusive. The failure of the Petitioners to have Joyce Roberts testify should not go unnoticed in this regard. She was, of course, the one

person who could testify as to whether she had in fact made a claim of rape and had in fact attempted to commit suicide.

Petitioners claim the attempted suicide would be admissible to show that the prosecutrix was mentally incompetent as a witness and to impeach her credibility. Yet, as the Court of Appeals pointed out, even if the defense had known of all the information later established, the record did not disclose a legally sufficient basis upon which an opinion could be predicated that she was either mentally incompetent on the date of trial or that her testimony was not to be believed. The psychiatrist called by the Petitioners stated that an attempted suicide on August 26, 1961 would not permit an opinion as to the mental condition of the prosecutrix on the date of trial in December, 1961, and that an attempted suicide may be caused by any number of factors not connected with mental illness. The prosecutor thought that the incident may have been related to the rape in which the Petitioners were involved; and obviously it would not be unreasonable for a jury to so conclude.

In light of the fact that this evidence in no way mounted up to showing the prosecutrix was incompetent as a witness, or in any way would have contradicted any of her trial testimony, any suppression did not amount to a denial of due process.

Petitioners erroneously indicate (Petition, pp. 31-32) that the Maryland Court of Appeals held the evidence concerning the second rape accusation and attempted suicide admissible in evidence, and therefore argue that they were denied equal protection of the laws in view of Maryland's provision that the jury is the judge of both the law and the facts (Maryland Constitution, Article XV §8, App. A of Petition). They claim that the Maryland Court of Appeals substituted its appraisal of the exculpatory value

of the allegedly suppressed evidence for the jury's. The simple answer is that the Maryland Court of Appeals did *not* hold that such evidence was admissible in evidence. The Court pointed out that specific acts of misconduct are not admissible to affect the credibility of a witness in Maryland, for such must be attacked by evidence of general reputation for truth or veracity or material contradictory facts; and that when consent is at issue, only general reputation for unchastity is admissible in evidence, and specific acts of intercourse are not admissible to establish lack of chastity (App. B of Petition, at pp. 55-56). What the Court did state, which the Petitioners have misconstrued, is that even assuming the evidence was admissible, for the purposes of argument, it was not material as a matter of law, and failure to disclose any such evidence, admissible or not, did not amount to a denial of due process (App. B of Petition, p. 55 and p. 53). The Court then did not substitute its judgment for that of the jury, for despite the Maryland provision on the authority of the jury, *supra*, the courts have retained the power to determine the admissibility of evidence. See *Brady v. Maryland*, *supra*, where it was pointed out that "Maryland's constitutional provision making the jury in criminal cases 'the judges of Law' does not mean precisely what it seems to say," and that it is the court, not the jury, which passes on the admissibility of evidence.

An analysis of the cases dealing with a denial of due process will show that the evidence or information suppressed in those cases was directly contrary to testimony on behalf of the State or directly supported testimony on behalf of the defense. The evidence here was not of this character and was not contradictory of any of the prosecuting witness' trial testimony. This point is clearly brought home by those cases which deal with the suppres-

sion of evidence relating to credibility. In *Napue v. Illinois*, 360 U.S. 264, the improperly suppressed evidence concerned the promise of leniency to a witness who denied on the stand that he had been promised leniency. This case and other similar cases fall within the prohibition against the use of perjured testimony by the State. Other similar cases are *Alcorta v. Texas*, 355 U.S. 28 (1957); *United States ex rel. Almeida v. Baldi*, 195 F. 2d 815 (3rd Cir. 1958); *Curran v. Delaware*, *supra*; *Powell v. Wiman*, 287 F. 2d 275 (5th Cir. 1961); *United States ex rel. Montgomery v. Ragan*, 86 F. Supp. 382 (N.D. Ill. 1949); *People v. Savvides*, 1 N.Y. 2d 554, 136 N.E. 2d 853 (1956). It is also significant to note that in *Griffin v. United States*, *supra*; *United States ex rel. Almeida v. Baldi*, 195 F. 2d 815 (3rd Cir. 1952), cert. den. 345 U.S. 904 (1953); and *United States ex rel. Thompson v. Dye*, 221 F. 2d 763 (3rd Cir. 1955) cert. den. 350 U.S. 875 (1955) the *prosecutor* himself had full knowledge of the information that was withheld.

In the other cases the suppressed evidence directly concerned a point at issue in the case, such as in *Barbee v. Warden*, *supra*, where the suppressed evidence related to the gun of the defendant which was introduced in evidence. The court made it very clear that the suppressed evidence became important only when the gun was introduced when it said at p. 85:

> "In our view, all of this evidence tending to exculpate the petitioner became highly relevant *the instant his revolver was produced* in open court, formally marked for identification, and witnesses interrogated about it. . . . *Once produced*, it became not only appropriate but imperative that any additional evidence concerning the gun be made available either to substantiate or to refute the suggested inference." (Emphasis supplied).

In *Griffin v. United States, supra*, the principal defense of the accused was that the deceased had attacked him and the evidence suppressed concerned an open knife in the pocket of the deceased. In *Thompson v. Dye, supra*, the defense in the case was that the accused was intoxicated. The prosecution called to the stand a police officer who testified truthfully that the defendant did not appear drunk to him, but did not call to the stand a policeman who would have testified that the defendant had appeared drunk when arrested. This case was made worse by the fact that the prosecution after receiving the testimony of the police officer as to drunkenness stated that there were other police officers who would testify to the same effect, but that they would not be called. In *Brady v. State, supra*, the State had in its possession a confession of an accomplice of the accused who admitted that he had committed the actual murder of the victim, which was the contention of Brady.

The Petitioners would make it appear that they were simply without knowledge as to the character of the prosecutrix. Quite to the contrary, however, a most cursory reading of the transcript of the original trial reveals an obvious awareness by the defense of the unchastity of the prosecutrix and of her general reputation for such. The lower court which heard the post conviction evidence made this obvious observation concerning the prior knowledge of the defense, as did the Court of Appeals. Defense knowledge was manifest not only in the Petitioners' own trial testimony but in the penetrating cross-examination of the prosecutrix. As has been many times stated, the defense may be as well able to explore outside sources of information as the prosecution. See e.g. *United States v. Lawrenson, supra*. In Maryland, where consent is at issue, specific acts of intercourse with others are not admissible to establish

lack of chastity; but evidence of general reputation for unchastity is admissible. *Humphreys v. State*, 227 Md. 115, 175 A. 2d 777 (1961); *Schertzer v. State*, 63 Md. 149 (1885). Knowledge of the August 26th events certainly would not have added anything to what the defense already knew about the general reputation for unchastity of the prosecutrix.

Furthermore, the alleged rape claim would not be available for the purposes of impeachment, for the record here shows that the prosecutrix did not make a complaint at all, much less a false rape claim. There is no basis upon which it can be argued that a jury could conclude that since a false rape claim was made by the prosecutrix on August 26th she also may have made an invalid claim against Petitioners. The simple fact is that the prosecutrix made no false rape claim about the August 26th incident — it being made by her father and denied unequivocally by the girl. Nor did she make any false rape claim against the Petitioners. The only possible use the defense could make of the facts surrounding the incident of the alleged false rape claim would be to show what the defense already knew, that the prosecutrix was unchaste.

Petitioners now argue farther that the evidence of the alleged rape claim and her sexual promiscuity show the prosecutrix is afflicted with nymphomania, and may be admissible on that ground, citing *People v. Bastian*, 330 Mich. 457, 47 N.W. 2d 692 (1951). The simple answer to this, as stated by the Maryland Court of Appeals, is that the record is devoid of facts from which such a conclusion could be drawn; and, even assuming that the prosecutrix may be said to be suffering from nymphomania, there is nothing in the record to show either that she consented to the acts of the Petitioners because of this or that she was thereby rendered incompetent as a witness.

Similarly, the Petitioners' claim concerning "near probation status" of the prosecutrix, determined adversely to the Petitioners in both the Court of Appeals and the post conviction trial court, is devoid of merit, there being nothing in the record to show a withholding of evidence concerning this matter, even assuming, for argument purposes, it to be significant.

Finally, as to the rather melodramatic plea set forth in the Petition, the words of Judge Learned Hand in *United States v. Garsson*, 291 Fed. 646, 649, are appropriate:

> ". . . Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition should he in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."

Despite the rather unnecessary, uncomplimentary, and perhaps acrimonious remarks directed in the Petition to the Montgomery County State's Attorney and his alleged breach of duty it seems that the Petitioners have overlooked the basic fact that the State's Attorney turned over his entire file to defense counsel for close scrutiny, and that in that file lay the name of Lt. Lloyd Whalen of the

Montgomery County police, the man in charge of the investigation of the case; the man who received the original telephone call from the father of the prosecutrix concerning the matter now allegedly suppressed; the man available for questioning by the defense; and the man who was apparently not questioned by defense counsel prior to trial.

II.

Petitioners Are Not Entitled to Relief Under the Decision in Escobedo v. Illinois.

Petitioners' convictions were affirmed on appeal by the Court of Appeals of Maryland on July 18, 1962, and this Court dismissed their appeals for want of a substantial federal question on April 22, 1963 (229 Md. 370, 183 A. 2d 359; and 372 U.S. 767). The convictions, therefore, had become final long before the decision in *Escobedo v. Illinois*, 378 U.S. 478, decided June 22, 1964. Respondent believes that the *Escobedo* decision was not intended to be retroactive, and should not be so applied in this case. *Escobedo* has most recently been held not to be retroactive in *United States ex rel. Walden v. Pate*, 350 F. 2d 240 (7th Cir. 1965); *Carrizosa v. Wilson*, 244 F. Supp. 120 (N.D. Cal. 1965); *United States ex rel. Conroy v. Pate*, 240 F. Supp. 237 (N.D. Ill. 1965); *In re Lopez*, 42 Cal. Rptr. 188, 398 P. 2d 380 (1965); *State v. Johnson*, 43 N.J. 572, 206 A. 2d 737 (1965); *Wade v. Yeager*, 245 F. Supp. 67 (D.N.J. 1965); *Hyde v. State*, 240 Md. 661, 215 A. 2d 145 (1965); *Bell v. State*, 175 So. 2d 80 (Fla. Dist. Ct. App. 1965); *People v. Hovnanian*, 22 A.D. 2d 686, 253 N.Y.S. 2d 241 (1964).

Especially in light of *Linkletter v. Walker*, 381 U.S. 618 (1965), wherein it was announced that the rule established in *Mapp v. Ohio*, 367 U.S. 643, did not operate retrospectively upon convictions finally decided prior to *Mapp*, the *Escobedo* case should not be retroactive in application.

In *United States ex rel. Walden v. Pate*, *supra*, the court considered a habeas corpus petition of a prisoner whose conviction became final in 1960 in a case in which the court found he had been denied access to counsel and had not been advised of his right to remain silent before he confessed. The court there said:

> "The Supreme Court has determined the question of prospective or retrospective operation of a new constitutional rule upon the basis of the purpose of the rule. Where the rule in question goes to the fairness of the trial, 'the very integrity of the fact-finding process,' as the Supreme Court said in Linkletter, retrospective application is called for, since doubt is cast on the question of the defendant's guilt. In both Escobedo and Mapp, however, the reliability of the evidence was not questioned; the attack was on admissibility of the evidence because it was obtained in violation of a fundamental constitutional right. As Mr. Justice White pointed out in dissent in Escobedo, 'Escobedo's statements were not compelled and the Court does not hold that they were.' 378 U.S. at 498.
>
> "Nothing expressed in either the Mapp or Escobedo opinion required retrospective application of the rule announced. The purpose of the Mapp and Escobedo rules is the deterrence of abuses by law enforcement officers. Experience had shown that the only effective means of enforcing compliance with the Fourth Amendment's prohibition against illegal searches and seizures was to render all evidence thus obtained inadmissible, and in Mapp the Supreme Court took that step. Escobedo was likewise the culmination of long experience with cases involving defendants who had been held and gave confessions without assistance of counsel. The administration of justice suffered from the difficulties for the trier of fact and for courts of review of determining from the conflicting testimony of the interested parties whether a confession was or was not voluntary, and a condition existed where ignorance of constitutional rights and absence of coun-

sel operated to the prejudice of persons in custody. In order to put an end to a system so fraught with potential abuses, the Supreme Court in Escobedo decided to remove the incentive to deny an accused the right to counsel by rendering inadmissible any confession obtained while such denial was in effect. It is because of the similarity of purposes that we, as the Supreme Court did with the Mapp rule in Linkletter v. Walker, hold that the rule of Escobedo does not apply retrospectively." (350 F. 2d 240, at 242-243).

Respondent respectfully urges that regardless of the theory, Escobedo should not be given retroactive application.

Furthermore, assuming arguendo, that retroactive application is to be given *Escobedo*, the Petitioners' confessions are not rendered inadmissible by that decision and there is no significant issue here presented upon which this Court should grant certiorari. Far more was involved in the circumstances of *Escobedo* in which this Court granted certiorari, and eventually reversed the conviction than are here presented.

Danny Escobedo was arrested on January 30, 1960, eleven days after his brother-in-law was fatally shot. Prior to his arrest he had retained the services of an attorney, and that attorney arrived at police headquarters shortly after the petitioner himself reached there. The attorney asked the desk sergeant for permission to speak to his client and was told that he could not see him. He then asked several homicide detectives to permit him to see his client and was again refused. He made the same request to the police chief, renewed it again, and was again denied. Escobedo himself had repeatedly asked to speak to his lawyer and was advised by police officers that his lawyer did not want to see him. He was not advised of his rights. Both

before and during the trial he moved to suppress the incriminating statement he had given. The facts of the instant case are in no way comparable, and it is also noted that no objection whatsoever to the admissibility of Petitioners' statements was made in the trial court, and still no claim is made that the statements were involuntary in fact.

III.

The Maryland Procedural Rule Which Required New Trial Motions, Based Upon Newly Discovered Evidence To Be Filed Within Three Days After Verdict Was Not Violative of Due Process and the Question Is Now Moot.

Petitioners contend that under Rules 567a and 759a of the Maryland Rules of Procedure (App. A of Petition) newly discovered evidence is not available as a ground for setting aside a conviction unless a new trial motion is filed within three days after verdict. Such claim is now moot under Maryland Rule 764 (App. A, *infra*), effective September 1, 1965. Under Maryland Rule 764, Section b, subsection 2, a new trial on the ground of newly discovered evidence which by due diligence could not have been discovered within three days after verdict may be granted if a motion is filed within ninety days after the imposition of sentence or within ninety days after receipt by the trial court of a mandate issued by the Court of Appeals upon affirmance of the judgment or dismissal of appeal.

In any event, regardless of any procedural time limit, this Court has held that there is no constitutional right to a new trial based upon newly discovered evidence. In *Townsend v. Sain*, 372 U.S. 293 (1963) at p. 317 it was said:

> "The existence merely of newly discovered evidence relevant to the guilt of a State prisoner is not a ground for relief on federal habeas corpus."

Such a statement could not have been made if due process required a new trial on newly discovered evidence. Petitioners cite no case in support of their proposition that it is a violation of due process for them to continue to serve life imprisonment when their innocence is demonstrable in court, for one simple reason, no case has ever held due process imposes such a requirement. See *Brown v. State*, 237 Md. 492, 498, 207 A. 2d 103 (1965) where it is pointed out that due process does not guarantee one the right to file a motion for a new trial after conviction for a criminal offense; and *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), stating there is no due process right even to an appeal. Also see *Cobb v. Hunter*, 167 F. 2d 888 (10th Cir. 1958).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATUTES AND RULES INVOLVED

Rule 764* of the Maryland Rules of Procedure (1965 Cum. Supp.) provides:

"*Rule 764. Revisory Power of Court.*

"a. *Illegal Sentence.*

"The court may correct an illegal sentence at any time.

"b. *Modification or Reduction — Time for.*

"1. Generally.

"For a period of ninety (90) days after the imposition of a sentence, or within ninety (90) days after receipt by the court of a mandate issued by the Court of Appeals upon affirmance of the judgment or dismissal of appeal, or thereafter, pursuant to motion filed within such period, the court shall have revisory power and control over the judgment or other judicial act forming a part of the proceedings. The court may, pursuant to this section, modify or reduce, but shall not increase the length of a sentence. After the expiration of such period, the court shall have such revisory power and control only in case of fraud, mistake or irregularity.

"2. Newly Discovered Evidence.

"The court may, pursuant to a motion filed within the time set forth in subsection 1 of this section, grant a new trial or other appropriate relief on the ground of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under section a of Rule 759 (Motion after Verdict)."

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* Rule 764 is included in Chapter 700, entitled "Criminal Causes." Subsection 2 to section b was added by a 1965 amendment, effective September 1, 1965.